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No. 86-1761

In the Supreme Court of the United States

OCTOBER TERM 1986

LOTTIE PRATT AND JOANN ALRED, PETITIONERS

v.

JACK SHOEMATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a 1978 amendment to the Osage Wills Act (Act of Apr. 18, 1912, ch. 83, 37 Stat. 86) requires the Secretary of the Interior to disapprove an otherwise valid will solely because the Indian testatrix disinherited some of her heirs at law.

2. Whether the Secretary's approval of the testatrix's will was against the clear weight of the evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 86-88) is unreported. The opinion of the district court (Pet. App. 74-85) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1986, and a petition for rehearing was denied on February 4, 1987 (Pet. App. 89). The petition for a writ of certiorari was filed on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Margaret Shunkamolah, an Osage Indian and a resident of Osage County, Oklahoma, died on January 16, 1981. She left an estate consisting of property subject to statutory restrictions against alienation, including a 3.59166

interest in Osage headrights valued at $690,891.78. Her will, dated April 17, 1978, as amended by a codicil to the will dated July 22, 1978, devised and bequeathed her property, in pertinent part, as follows (Pet. App. 76):

> To son Joseph Lee Shunkamolah, Jr. - .59166 Osage headright interest;
>
> To daughter Gladys Belle Rouwalk - two Osage headrights, * * * [and the] residue of real and personal property[;]
>
> To daughter Lottie A. Pratt [petitioner herein] - $5.00
>
> To daughter JoAnn Shunkamolah Alred [petitioner herein] - $5.00.

The testatrix also divided one Osage headright and cash among various grandchildren. The will provided the following explanation for the testatrix's testamentary plan (Pet. App. 36-37, 76-77):

> LOTTIE A. PRATT, daughter, the sum of $5.00. The reasons that I give only $5.00 to Lottie Pratt is because I have heretofore in my lifetime, given her forty (40) acres, with a home thereon and improvements thereon.
>
> Further, I have given Lottie an additional one hundred twenty (120) acres of pasture land. I supported Lottie A. Pratt, my daughter, and her three (3) sons for 19 years; providing all of the food, utilities, cost of transportation and have given automobiles to her children, in order that they could commute from Oklahoma Military Academy and other schools to Lottie's home, and I have provided during the 19 years for numerous trips and vacations for Lottie and her three sons, therefore, she has been well provided for during my lifetime.
>
> JoANN SHUNKAMOLAH ALRED, daughter, the sum of $5.00. JoAnn has been given by me, for many

years, help with her support, upkeep, transportation and the purchase of automobiles. JoAnn filed a lawsuit in the District Court, Osage County, against me, which not only defamed my reputation, but it caused me great embarrassment and humiliation, and I then stopped giving her any more money. She has been hateful, mean, hostile and ugly toward me. I do not understand why she felt this way toward me, after I brought her into this life and helped her for so many years. This explains why I am only giving her $5.00 under this my Last Will and Testament.

2. Congress has conferred on the district courts of Oklahoma probate jurisdiction over the property of deceased Osage Indians. See Section 3 of the Act of Apr. 18, 1912 (the 1912 Act), ch. 83, 37 Stat. 87, as amended by Section 5(b) of the Act of Oct. 21, 1978 (the 1978 Amendment), Pub. L. No. 95-496, 92 Stat. 1662. However, the will of an Osage Indian that disposes of his or her Osage headright interest or other restricted property can be admitted to probate only after the Secretary of the Interior determines that the will is valid (Section 8 of the 1912 Act (37 Stat. 88), as amended by Section 5(a) of the 1978 Amendment (92 Stat. 1661)). Pursuant to implementing regulations, 25 C.F.R. 17.1-17.14, the Field Solicitor of the Pawhuska Field Office, who is the designated special attorney for the Osage Indians, conducts a hearing on the record as to the validity of the will. The Field Solicitor then transmits the record of the hearing to the Superintendent of the Osage Agency who determines the validity of the will on behalf of the Secretary. Dissatisfied legatees or would-be legatees may appeal the Superintendent's determination to the Regional Solicitor, Southwest Region, in Tulsa, Oklahoma (25 C.F.R. 17.14(b)). The Regional Solicitor's review of the Superintendent's determination constitutes final agency action from which appeal lies in federal district court (Section 8 of the 1912 Act, as

amended by Section 5(a) of the 1978 Amendment). The 1912 Act, as amended, specifies that the Superintendent's decision shall not be reversed unless it is "against the clear weight of the evidence" (§ 5(a), 92 Stat. 1661-1662).

3. Margaret Shunkamolah's will was approved by the Superintendent on October 22, 1982, in accordance with the above-described statute and regulations (Pet. App. 1-4). Two of the testatrix's daughters, petitioners Lottie A. Pratt and JoAnn Shunkamolah Alred, who received only $5 each under the will, appealed the Superintendent's decision to the Regional Solicitor. The Regional Solicitor affirmed the order of the Superintendent on July 27, 1983 (*id.* at 33-53).

The Regional Solicitor found that the will had been executed by the testatrix in accordance with Oklahoma law before two witnesses to whom the testatrix declared the document to be her will (Pet. App. 39-41). He further found that, although there was conflicting evidence concerning the testatrix's mental capacity, the evidence as a whole indicated that the testatrix was mentally competent and possessed the requisite testamentary capacity under Oklahoma law at the time she executed the will (*id.* at 42-44). The Regional Solicitor also found that, although the testatrix had lived with and been cared for by her daughter, respondent Gladys Rouwalk, during the last years of her life, there was insufficient evidence that the disinheritance of petitioners was the result of undue influence exercised by Rouwalk (*id.* at 44-46, 49-52). He found that the provisions of the will revealed that the testatrix had "conceived a rational scheme for the testamentary disposition of her property" and provided "a lucid justification of the bequests about which she anticipated questions would be raised" (*id.* at 45-46). Finally, the Regional Solicitor rejected petitioners' contention that the will, which was valid under Oklahoma law and reflected a rational testamentary scheme, should be disapproved as "inequitable" to petitioners (*id.* at 46-48).

4. Petitioners appealed the final decision of the Secretary to the United States District Court for the Northern District of Oklahoma, challenging the constitutionality of the 1978 Amendment as well as the findings that the testratrix possessed testamentary capacity and was not unduly influenced at the time she executed the will. The district court affirmed the Secretary's decision approving the will as not against the clear weight of the evidence (Pet. App. 74-85). The district court also held that the 1978 Act was a constitutional exercise of congressional authority based on the "special relationship between the federal government and restricted Indians" (*id.* at 78-80).

5. The court of appeals affirmed (Pet. App. 86-88). It rejected petitioners' constitutional challenge, relying on the "long recognized" congressional authority to regulate the probate of Indian estates (*id.* at 87). The court of appeals also rejected petitioners' contention that the 1978 Amendment had repealed the 1912 Act's adoption of Oklahoma law for determining the validity of Osage wills. Petitioners argued that the 1978 Amendment created special federal presumptions and burdens of proof favoring Indian heirs that preempt Oklahoma law. The court, however, interpreted the 1978 Amendment to retain the 1912 Act's incorporation of Oklahoma law regarding will execution and testamentary capacity. Pet. App. 87-88. Finally, the court of appeals upheld the district court's conclusion that the Secretary's findings—that the testatrix possessed testamentary capacity, that the will was properly executed, and that the testatrix was not subjected to undue influence—were not against the clear weight of the evidence (*id.* at 88).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' contention that the 1978

Amendment to the 1912 Act requires the Secretary to disapprove the will solely because the testatrix disinherited some of her heirs at law is contradicted by the statutes in question, their legislative histories, and this Court's decision in *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970). Petitioners' other challenges to the validity of the will are simply challenges to the fact-finder's weighing of the evidence and present no legal issue of any importance. Accordingly, this case does not warrant further review.

1. Petitioners contend (Pet. 3-8) that the 1978 Amendment repealed the 1912 Act's requirement that the Secretary apply Oklahoma law in determining the validity of Osage wills. They argue that the Secretary must disapprove any will which disinherits Osage Indian heirs even if the will is otherwise valid under Oklahoma law. Petitioners base this interpretation on a single word added to the statute by the 1978 Amendment. Section 8 of the 1912 Act provided that any competent adult member of the Osage Tribe may dispose of his estate "by will, in accordance with the laws of the State of Oklahoma." Section 5(a) of the 1978 Amendment substituted the provision that an adult Osage Indian may dispose of his estate "by will *executed* in accordance with the laws of the State of Oklahoma" (emphasis added). From the addition of the word "executed," petitioners infer that Congress intended that only Oklahoma law regarding the technical requirements of execution would apply to Osage wills. In place of Oklahoma law's standard for testamentary capacity, petitioners contend that the 1978 Amendment substituted a sort of "heir-protective" federal common law which governs the Secretary's approval of Osage wills. There is no support for that contention in the language of either the 1912 Act or the 1978 Amendment. Furthermore, as the court of appeals correctly noted (Pet. App. 87), the legislative history of the 1978 Amendment clearly shows

that Congress did not intend to alter the Secretary's application of Oklahoma law to Osage wills. See H.R. Rep. 95-1459, 95th Cong., 2d Sess. 4, 6 (1978); S. Rep. 95-1157, 95th Cong., 2d Sess. 7, 10, 15 (1978).[1]

Petitioners also contend (Pet. 5) that this Court held in *Tooahnippah* v. *Hickel, supra*, that the Secretary must withhold approval of an Indian will, even though the will meets the state law requirements for validity, if the will disinherits a natural object of the testator's bounty. Petitioners have simply misread that case, which in fact holds precisely the opposite. In *Tooahnippah*, the Regional Solicitor, exercising his authority under an analogous statute, disapproved the will of a Comanche Indian which disinherited the testator's illegitimate daughter in favor of his niece. The Regional Solicitor acknowledged that the will was otherwise valid, but based his decision on his own view of what constituted "just and equitable treatment" of the testator's heir at law. 397 U.S. at 602. This Court reversed the Regional Solicitor's decision, holding that the statute had not authorized him to revoke or rewrite an Indian's will that reflected "a rational testamentary scheme" simply because the Regional Solicitor felt that the disposition of the estate was not "just" and "equitable" (397 U.S. at 609-610).

The Regional Solicitor in the instant case found that the testatrix's will reflected a rational testamentary scheme by devising and bequeathing the bulk of her estate to the daughter who cared for her in her last years and by disinheriting the two daughters to whom she stated she had already given land and money during her lifetime (Pet. App. 45-46, 50). This finding was affirmed by the district court (*id.* at 83) and by the court of appeals (*id.* at 88). Petitioners do not

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[1]Petitioners claim (Pet. 6) support for their statutory interpretation in a "Congressional Committee of the Whole Colloquy" but offer no citation to the Congressional Record or any other source.

challenge the rationality of the testatrix's disposition in the will. They argue only that, as the testatrix's heirs at law, they have a right to inherit her estate. No such right is to be found in the 1912 Act or the 1978 Amendment; nor has one been recognized in any decision of this Court.

2. Petitioners' remaining arguments (Pet. 8-17) challenge the Regional Solicitor's factual findings. First, petitioners contend (Pet. 8-10) that the will was not executed as required by Oklahoma law because one of the attesting witnesses had not clearly remembered the testatrix's actions and statements. However, applying Oklahoma law, the Regional Solicitor determined that the self-proving affidavit executed by the witness at the time he witnessed the will was sufficient evidence to show that the witness had observed the testatrix declare the instrument to be her will and request the witnesses to sign it (Pet. App. 39-40). The Oklahoma statute governing self-proved wills, Okla. Stat. Ann. tit. 84, § 55 (West Supp. 1987), provides that self-proved wills shall be admitted to probate without the testimony of any subscribing witnesses "unless contested." Petitioners misinterpret (Pet. 10) the caveat "unless contested" as nullifying the effect of the self-proving affidavit if the will is contested. However, Oklahoma case law makes clear that the self-proving attestation of the witnesses creates a rebuttable presumption of due execution which makes the testimony of those witnesses unnecessary for the proponent's case in chief. The contestant must present affirmative evidence that the will was not properly executed to overcome the presumption created by the self-proving affidavits. *Hobbs* v. *Mahoney*, 478 P.2d 956, 958-959 (Okla. 1970); *In re Estate of Lambe*, 710 P.2d 772, 775 (Okla. Ct. App. 1985). No such evidence was presented here.

Second, petitioners argue (Pet. 10-13) that the Regional Solicitor's finding that the testatrix had testamentary capacity is contrary to the clear weight of the evidence. The

Regional Solicitor acknowledged that the evidence of the testatrix's mental capacity was "conflicting" (Pet. App. 42). The Regional Solicitor concluded, however, that the evidence supported the finding of the hearing officer that the testatrix had testamentary capacity and that, since the hearing officer had an opportunity to observe the demeanor of the witnesses, his finding should not be disturbed (*id.* at 43-44). Petitioners' recitation of some of the evidence describing episodes of senility and hallucination experienced by the testatrix does not show that the Regional Solicitor's finding of testamentary capacity was against the clear weight of the evidence *as a whole*.

Finally, petitioners challenge (Pet. 13-17) the Regional Solicitor's finding that the will was not the product of undue influence. The Regional Solicitor found that, although the testatrix lived with and was cared for by respondent Rouwalk during the last years of her life, there was insufficient evidence to show that any influence respondent Rouwalk may have had over the testatrix was sufficient to "destroy the free agency" of the testatrix (Pet. App. 44-46, 49). The Regional Solicitor further found that, even if a presumption of undue influence were raised by respondent Rouwalk's close relationship to the testatrix, the testatrix's access to the independent advice of her conservator rebutted the presumption of undue influence (*id.* at 51-52).

Petitioners contend (Pet. 13-14) that this reliance on the testatrix's access to her conservator is unwarranted because he did not discuss with her the specific terms of her will as drawn and executed in 1978. However, the conservator testified that in 1977 the testatrix had discussed with him the terms of an earlier will by which she had disinherited petitioners and, despite his warnings that her will would be challenged if she disinherited some of her children, she remained firm in her resolve not to leave certain of her children any of her estate because she said they had treated

her badly and she had already given them money and property (Pet. App. 54-57). The "independent advice" which, under Oklahoma law, is sufficient to overcome a presumption of undue influence need not be advice given at the time the will is actually drafted; all that is required is "that the testator had the benefit of conferring fully and privately about the consequences of [the] intended will." *White* v. *Palmer*, 498 P.2d 1401, 1406 (Okla. 1972). The Regional Solicitor correctly determined that the testatrix's access to her conservator and her conversations with him concerning her testamentary intentions met that test.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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